INDEX.

PAGE

ARGUMENT:

I. ANSWER TO ISSUES AS PRESENTED IN PETITIONERS' BRIEF AND THE FACTS .. 1

(a) COUNTER STATEMENT OF QUESTIONS INVOLVED 9

II. THE COMMONWEALTH OF PENNSYLVANIA HAS NO INTEREST IN THE MORTGAGE TRUST FUND, THE SECRETARY OF BANKING BEING A MERE ADMINISTRATIVE OFFICER, HAVING CUSTODY, BUT NOT EXCLUSIVE POSSESSION NOR CONTROL OF THE MORTGAGE TRUST FUND 9

III. THE COURT OF COMMON PLEAS DID NOT HAVE EXCLUSIVE JURISDICTION OF THE MORTGAGE TRUST FUND 15

IV. THE APPOINTMENT OF RECEIVER DID NOT VIOLATE THE ELEVENTH AMENDMENT 19

V. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION BY APPOINTING RECEIVERS. 23

VI. CONCLUSION 28

APPENDIX A.

MORTGAGE POOL PROVISIONS OF THE BANKING ACT OF 1923 32

MORTGAGE POOL PROVISIONS OF THE BANKING ACT OF 1933 33

LIST OF CASES.

PAGE

ALLEN v. UNITED STATES, 285 FED. 678 (CCA 1st Circuit 1923) 21

COMMONWEALTH v. PENN GENERAL CASUALTY CO., 316 Pa. 1 27

COMMONWEALTH OF PENNA. v. WILLIAMS et al., 72 FED. (2d) 509; (CCA 3rd CIRCUIT, 1934) 19

FIRST NATIONAL BANK OF SAN FRANCISCO et al. v. DETROIT TRUST CO. et al., 248 FED. 16 (CCA 9th CIRCUIT 1918) 27

FARMERS' LOAN AND TRUST COMPANY v. LAKE STREET ELEVATED RAILROAD COMPANY, 177 U. S. 51, 21 SUP. CT. 564, 44 L. ed. 667 17

FRANKLIN NATIONAL BANK v. KENNERLY COAL & COKE CO., 300 Pa. 479, 150 A 902 (1930) 27

HARKIN v. BRUNDAGE, 276 U. S. 36, 48 SUP. CT. 268; 72 L. ed. 457 18

KINGSPORT PRESS, INC., v. BRIEF ENGLISH SYSTEMS, INC., 54 FED. (2d) 497 (CCA 2nd CIRCUIT, 1931) 27

MITCHELL v. MAURER, 690 FED. (2d) 233; (CCA 9th CIRCUIT, 1934) 22

MORRILL ET AL. v. AMERICAN RESERVE BOND COMPANY, 151 FED. 305 (CCA 8th CIRCUIT, 1907) 19

MURRAY v. WILSON DISTILLING CO., 213 U. S. 151; L. ed. 742 (1965) 22

NATIONAL SURETY COMPANY v. STATE BANK OF HUMBOLT, 120 FED. 593 (CCA 8th CIRCUIT 1903) 19

LIST OF CASES (Continued).

PAGE

O'NEIL v. WELCH, 245 FED. 261 (CCA 3rd CIRCUIT 1917) 16

PORT NEWARK NATIONAL BANK OF NEWARK v. WALDRON, 46 FED. (2d) 296; (CCA 3rd CIRCUIT 1930) 16-17

STATUTES.

PENNSYLVANIA ACT OF JUNE 15, 1923, P. L. 809 32

PENNSYLVANIA ACT OF MAY 15, 1933, P. L. 565 33

IN THE

Supreme Court of the United States

No. 550. October Term, 1934.

WILLIAM D. GORDON, Secretary of Banking and ROBERT G. FUNKHOUSER, Special Deputy as Agent in Possession of Chester County Trust Company,

Petitioners,

vs.

MARY A. O'BRIEN, Complainant, and JOHN HEMPHILL and J. LOUIS BREITINGER, Receivers of Trust Fund Mortgages Aggregating $1,742,404.91,

Respondents.

ARGUMENT.

ANSWER TO ISSUES AS PRESENTED IN THE PETITIONERS' BRIEF AND FACTS.

In an attempt to meet the arguments presented in Petitioners' Brief this responding argument may appear somewhat voluminous. This was necessitated by the unusual highways traversed by the facile pen of the Petitioners.

In a last desperate attempt to secure a ruling compatible with the wishes of the Department of Banking, Petitioners have resorted to arguments calculated to de-

tract from the real question at issue. The Petition and argument misquotes the record; misstates the conclusions of the Circuit Court of Appeals unjustly; casts slurs on the District Court; artfully selects for argument purposes the case in which the complainant has the smallest participating interest, disregarding the $40,000.00 interest of the complainant in the companion suit; subtly prints the petition to intervene as a part of the record filed in the Circuit Court of Appeals by lawyers representing other interests, who would undoubtedly benefit by appointment of their own suggested Receivers (although up to the present time a copy of this petition has not been served on the respondent, Receivers or their counsel, *nor has the right to intervene even been allowed by the Circuit Court*); refers in like vein, to a futile decree handed down on a legal holiday—Labor Day—by the Common Pleas Court of Chester County in defiance of the mandate of the Federal Court (Petitioners' Brief P. 20); presenting a fictitious issue of interference with the performance of the duty of the State officers, and conjures ill omens and dire consequences if the appointment of Receivers is sustained; insinuatingly makes reference to the cases of the Commonwealth of *Pennsylvania vs. John G. Williams et al October Term, 1934, #394, and Gordon, Secretary of Banking vs. Joseph Ominsky et al October Term, 1934, #395,* in which certioraris were granted by the Supreme Court—as if there was any similarity between those cases and this (Petitioners' Brief P. 10); interchangeably employs the name of the Secretary of Banking in possession of the Trust Company, who is the real defendant, with the Commonwealth of Pennsylvania, as if the State of Pennsylvania were the defendant,—and all to what purpose? Not that the Secretary of Banking shall administer the mortgage pool until final liquidation, for that he has no right to do under the statutes which he invokes, but that the Receivers of the Federal Court may be ousted and the Chester County Court

appoint Receivers at the instance of other attorneys or certificate holders. Elsewhere in this Brief will be found the specific references to the Record and Petitioners' Brief where these abuses appear.

Is this the duty of a State officer? For whose benefit, have the dilatory tactics utilized so far been employed? Not for the poor certificate holders who are still waiting for results of their investment. Not for the State of Pennsylvania, which has no interest in this pool? Why not frankly face the facts and argue the single question involved: viz: *since the Secretary of Banking cannot, under the State statutes continue to liquidate and administer the mortgage trust pools and since Receivers must be appointed, Should the Federal Courts, having first obtained jurisdiction, or the local County Court appoint the Receivers?* Even a reference to the Petition to Intervene (R. 107) shows this to be the only question. Therein Petitioner concludes:

> "Your Petitioners, therefore, believing that it will be greatly to their advantage to have this pool *administered under the jurisdiction of the Court of Common Pleas of Chester County, and by a receiver or receivers appointed by said Court.* . . ."

Obviously, lawyers of Chester County representing other certificate holders who do not represent the Federal Receivers would prefer the local courts to appoint Receivers suggested by them. But of what benefit is that to the Banking Department or to the State of Pennsylvania—or, of what concern is it in this argument? Reference by the Petitioners to the Petition to intervene actually propounds this question: Where a Federal Court has appointed receivers at the instance of a small representation of a mortgage pool and thereafter a larger group suggests that they

would have a State Court appoint receivers, should the Federal Court relinquish its jurisdiction? This type of race for jurisdiction is the very thing the Courts have sedulously avoided. This is the type of litigation contrary to public policy and yet clearly is presented by the Petitioners.

In truth and in fact, the Banking Department would be best served by the immediate surrender to the Federal Receivers of the Mortgage Trust Pool. This should have been done many months ago, even as the Secretary of Banking should have divested himself of the Trust Pool months prior to the filing of the Bill for the appointment of Receivers, and devoted himself to his duty to liquidate the assets of the Bank for the benefit of the depositors. For under the Act of 1923, under which Act he took possession, the Secretary of Banking, when he has determined to liquidate the assets of a Bank is directed to give the beneficiaries written notice to apply within thirty days for the appointment of a substituted fiduciary and in the event they neglect to do so, then the Secretary must himself apply for such appointment. (Quoted in full in Appendix at Page 32.) And under the Act of 1933, at any time before or after the Secretary of Banking files an account of the mortgage pool, a substituted fiduciary in his place may be appointed; and he is compelled, within thirty days after the filing of his account, to himself apply for a substituted fiduciary in the event that no beneficiary has so acted. True, it is that the Act says he is to file his account "at his convenience", but that must mean within a reasonable time after he has taken possession. He cannot unreasonably hold up the filing of an account of the pool in order to continue liquidating such funds. *But regardless of his filing an account of the pools—any participant even under the Act of 1933 may at any time come in and ask for the appointment of a substituted fiduciary.*

Considerable confusion is created by the Petitioners'

Brief in its reference to the Building and Loan Cases heretofore mentioned. Since these cases are not analogous, for what purpose is reference made to them so strenuously? The inference is clear. In those cases, the Petitions for writs of certiorari were granted and the inference is that the same conclusion should be reached in the present case. But the issues in both cases are entirely different from those here involved. In the Building and Loan cases, the *contest is between the Secretary of Banking and the Federal Receivers for the right to liquidate the assets of the Association.* In the case at bar, the general assets of the Trust Company are not involved. The Secretary of Banking continues without interference to administer the assets. IT IS ONLY THE MORTGAGE TRUST POOL WHICH HE MUST SURRENDER TO THE RECEIVER IN WHICH HE HAS NEITHER RIGHT NOR INTEREST—FOR THE VERY STATUTES UNDER WHICH THE SECRETARY OF BANKING TOOK POSSESSION AND WHICH DETERMINED HIS DUTIES AND OBLIGATIONS SPECIFICALLY COMMAND HIM TO SURRENDER THE POOL TO ANOTHER FOR PURPOSES OF ADMINISTRATION.

Petitioners' Brief presents a further confusion in its reference to the fact that if the appointment of the Receivers is sustained, it will mean the taking of assets bodily away from the Banking Department. But that is no issue, for this is a daily occurrence in the administration of trust estates held by closed banks, or banks in liquidation by the Secretary of Banking. In Philadelphia County and elsewhere trust funds have frequently been bodily taken from the Secretary of Banking in possession of a closed bank which is being liquidated—and at no time has the Secretary of Banking raised a similar objection—that funds are bodily being taken from him.

Moreover, there is no Federal question involved in

the instant case. Suits against the Secretary of Banking are continuously brought in the State and Federal courts and no one has ever claimed such action to be in violation of the Eleventh Amendment. It is sheer sophistry to contend that the Secretary of Banking in possession is only nominal defendant and, the State, the real party in interest, when the State hasn't the slightest interest in the proceedings; when the State has no property interest to protect and when the official involved is an administrative officer and not an arm of the executive branch of the State government. On the contrary, this Petition by the Secretary of Banking in possession is detrimental to the State, in the sense that a mere administrative official, overwhelmed by a title and influenced by the "magic of words", which he elsewhere derides, enters the highest Tribunal of the United States, with a proclamation "I am the State".

In addition to confusing the issue by the presentation of facts incorrectly stated and inferences unfairly drawn, there is also a serious omission. The Petitioners have carefully avoided directing the attention of this Court to the provisions of the statutes which give a participant in the mortgage pool the right at any time to ask for the appointment of a substituted trustee, both by the Act of 1923, under which the Secretary of Banking took possession and as well under the Act of 1933.

It is respectfully submitted that when these statutes were called to the attention of the District Court at the hearing held September 26, 1933 (R: 63), counsel also called attention to the comment of the Attorney-General, printed in the analysis of the Act of 1933, as follows:—

> "The owner of an undivided interest in any mortgage or securities pool or in a special mortgage securities pool probably has the right to ask for a substituted fiduciary at any time."

We have endeavored by way of introduction to point out inaccurate and irrelevant references in Petitioners' Argument and to indicate the confusion which might arise from the presentation of facts and questions as outlined in the Petitioners' Brief.

FACTS.

On August 25, 1933, the complainant, a citizen of the State of New Jersey and a participant in the Mortgage Pool filed a bill for the appointment of a Receiver in the District Court of the United States for the Eastern District of Pennsylvania, naming as defendants the Secretary of Banking and his Deputy, who were in possession of the general assets of the Chester County Trust Company and in custody of a certain Mortgage Trust Pool since February 14, 1933. The bill alleged that the assets of the bank were being liquidated; that as to the Mortgage Trust Pool, since that latter date interest on the mortgages and taxes on much of the real estate securing the mortgages was unpaid and that little effort was being made by the Secretary of Banking to compel the payment of the same, and that the certificate holders were receiving no returns for their investment, nor could they ascertain their equity in the same since the Secretary of Banking had failed to file an account of the mortgage pool.

On the same date, to wit, August 25, 1933, complainant filed a motion for the appointment of a Receiver. Pending hearing on the bill and answer, the Court fixed five days later for the hearing and due service was made of said bill, motion and notice of hearing by the U. S. Marshal. *However, on the day fixed for the hearing, the defendants failed to appear and at the instance of the Court, the attorney for the Banking Department was telephoned by the Clerk of the Court and later appeared and vigorously opposed the appointment of Receivers.* No answer was filed by the Secretary of Banking, though practi-

cally requested to do so by the Court (R. 64), nor was any answer ever filed subsequent thereto.

The Court appointed Receivers, but inadvertently omitted the word "temporary", which excusable error was corrected by an Order filed September 22, 1933, (R. 55). This correction, it may well be argued was unnecessary for the appointment of the Receivers having been made before the defendant filed his answer, the appointment could only be effective until hearing on Bill and Answer.

On Labor Day of 1933, immediately after the appointment of Receivers by the Federal Court and after service of the Decree of the United States District Court and after demand for the surrender of the Mortgage Pool was made, and surrender refused by Petitioners, an injunction issued from the Common Pleas Court of Chester County at the instance of Chester County lawyers representing another certificate holder, without notice to the Federal Receivers, restraining the Secretary of Banking from turning over any of the assets of the bank to the Federal Receivers. Contempt proceedings were instituted but not pressed by counsel for Complainant.

Hearings were thereafter had by the District Court to give opportunity to others in interest to appear, and show cause, if any they have, why the Receivers should not be appointed, but no one appeared other than the Deputy Attorney-General. At that time, lawyers representing other certificate holders were in Court. These are the complete facts in the case. The only question presented and argued before the Lower Courts and *pertinent* here, involved the status of the Secretary of Banking as a statutory Receiver, the particular limitations placed upon the mortgage trust pool; and the rights of courts having concurrent jurisdiction and Petitioners attempt to invoke the 11th Amendment, which we respectfully submit is irrelevant.

(a) COUNTER-STATEMENT OF THE QUESTIONS INVOLVED.

The questions as stated in Petitioners' Brief do not present a sincere statement of the problem of this case. Accordingly, a counter-statement of the questions involved follows:

1. Where a bank, in the State of Pennsylvania, operating a mortgage pool has been taken over by the Secretary of Banking on account of insolvency and which bank he has determined to liquidate, and under the statutes of the State, the mortgage pool is kept separate and apart from the other assets of the bank, and the Secretary is directed to divest himself of the pool, can a non-resident of the State of Pennsylvania, a participant in the mortgage pool, proceed in the United States District Court to have a substituted fiduciary or Receiver appointed for the pool?

2. Can a State statute, providing that a substituted fiduciary of a mortgage pool shall be appointed by the State Court, deprive a citizen of another State of his equitable rights in a Federal Court?

II.

THE COMMONWEALTH OF PENNSYLVANIA HAS NO INTEREST IN THE MORTGAGE TRUST FUND, THE SECRETARY OF BANKING BEING A MERE ADMINISTRATIVE OFFICER, HAVING CUSTODY, BUT NOT EXCLUSIVE POSSESSION NOR CONTROL OF THE MORTGAGE TRUST FUND.

Neither by any legal concept, nor by any logical conclusion can such control and exercise of jurisdiction over the Mortgage Pool involved in the instant case be found in the Common Pleas Court of the State of Pennsylvania,

so as to preclude the exercise of jurisdiction by the United States Court. Both the status of the Secretary of Banking as a Statutory Receiver and the particular qualifications placed upon the Pool in question render the Petitioners' contention of exclusive possession an impossibility. Incidentally under the Act of 1923, under which the Secretary took possession of the bank, he was not even called a Receiver—his title then was "Secretary of Banking in Possession" of the particular bank. It was only by the Act of 1933 that the statutes renamed him a Receiver.

An analysis of the Act of June 15, 1923, P. L. 809, the Banking Act in effect at the time the Secretary of Banking took possession and the subsequent Act of May 15, 1933, P. L. 565, which went into effect on July 3, 1933, yield a double conclusion:—

1. The Mortgage Trust Pool is only in the temporary custody of the Secretary of Banking, who is specifically ordered and directed to divest himself of it.

2. The Secretary of Banking is only a "Receiver" in nomine, having none of the powers of an Equity Receiver with the corresponding obligations which would subject him to the jurisdiction of the Court of his appointment.

At the time of the taking of possession of the Chester County Trust Company by the Secretary of Banking, whatever powers may have been conferred upon him under the Banking Act of 1923, *as to his control of the general assets of the Bank,* or whatever his duties were in respect to those assets *is immaterial in this argument. We are only concerned with his duties in relation to the Mortgage Pool.* The issue then isolates itself, not to the irrelevant question of interference with the Secretary of Banking in his administration of the general assets of an institution, but to the issue of control of the specific Mortgage Pools. For, after the appointment of a substituted fiduciary for such pools as is required by the Banking Acts, divesting the

Secretary of Banking of the temporary custody of such pools, he *still continues to administer the assets of the Trust Company without interference by the fiduciaries appointed for the Mortgage Pool.*

The Act of 1923 provides specifically what the Secretary of Banking is to do with these Pools, when he has taken possession of the general assets of a banking institution. Section 40 of this Act (quoted in full at Page 32 in the Appendix to this Brief), *provides in substance that a Mortgage Pool is a Trust Fund and forms no part of the general assets of a bank and is to be kept separate and apart from the other assets of the bank, by the Secretary of Banking, who is given preliminary custody thereof, with a clear and specific direction to divest himself of this fund.*

The later Act of 1933 similarly segregates trust funds after the Secretary of Banking has taken possession of an insolvent bank. By Section 801 of this Act, under the general heading of "Secretary in Possession of Trust Department" it is provided:

> "Section 801. Institution as Fiduciary.—References in this act to funds, property, or investments held in a fiduciary capacity by an institution of which the secretary has taken possession, shall apply only to funds, property, or investments held in such fiduciary capacity by the trust department of such institution, and shall not apply to funds, property or investments which were held by the commercial department of such institution."

In sub-section B of section 40 of the Act of 1923, a limitation on the administration of such Mortgage Pools, is definitely imposed upon the Secretary of Banking inasmuch as he is ordered to notify all the beneficiaries to apply for a substituted fiduciary, the Trustee Bank being insolvent and in liquidation. And even further, it is pro-

vided that the Secretary may turn over the fund to a substituted fiduciary, selected by the agreement of all the beneficiaries. *Such fund may be turned over without the filing of a formal petition for the appointment of a substitute, and moreover, without any judicial approval.*

While the Act of 1933 provides that substituted fiduciaries may be appointed before or after the Secretary of Banking has filed his account, it further specifically provides in Section 904-B (quoted in Appendix at P. 36) as follows:

> "... *The court may, after petition filed pursuant to the provisions of this section, order the secretary to make such transfer even prior to filing an account,* in which case it may also reserve for future determination any question which may arise upon the audit of the account. ..."

The obvious intention evidenced by statutory direction of the Legislature was to provide for the speedy surrender of all Trust funds so as to leave the Secretary of Banking free to liquidate the general assets of the bank for the benefit of the depositors, *but definitely to exclude the Secretary of Banking from himself administering the same.* In the instant case, the Secretary of Banking failed and neglected to notify the beneficiaries to apply for the appointment of a substituted Trustee as he was duty bound to do under the Act of 1923. The Petitioners attempt to justify this stand by stating (Page 22, Petitioners' Brief) that the secretary may apply for the appointment of a substituted Trustee only if no application is made by a beneficial owner within thirty days after the filing of his account. This ignores his dereliction under the Act of 1923 and ignores the right of a substituted fiduciary to be appointed at any time on Petition of a participant of the pool. Clearly, this is an attempt to cloud the issue, for this provision of the Act is intended to take effect only if

no one applies for the appointment of a Receiver after the Secretary has given them formal notice to do so. Moreover, is this argument valid? When is the Secretary of Banking to file his account? The Act states "at his convenience", but unquestionably such a clause cannot be used in justification and excuse for the neglect and failure of the Secretary of Banking to act between the 14th of February, 1933, and the 25th of August, 1933—nor until the present day.

No substantial change is made in the Banking Act of 1933, which became effective on July 3, 1933. The jurisdiction of the Secretary is not enlarged. On the contrary, this Act includes a number of sections headed "Mortgage Pools" and by Section 904, (quoted in full in the Appendix), the Secretary is specifically directed to divest himself of these pools by making application for that purpose. What then, is the statutory power and duty of the Secretary of Banking as to these assets? It is submitted that these conclusions follow:

That after the Secretary of Banking has filed his certificate of possession, which is a mere notification of his intention to enact his statutory duty, he must notify all the beneficiaries that it is their right to apply for a substituted fiduciary to administer these funds, and if all the beneficiaries should come to him with their nominee, he must divest himself of this fund in favor of such person, and this he may do without the consent of any Court. If, however, no beneficiary should avail himself of the right of demanding a substitute fiduciary, then the Secretary is compelled, within thirty days after he has filed his account, to request the appointment of such a substituted fiduciary. That, finally, *this account must be filed within a reasonable time.* In other words, in no event is the Secretary of Banking to administer these funds to a finality. His possession is a mere naked custody, which cannot possibly be construed as giving such constructive control and dominion

to the Court, in which he has filed his certificate of possession as to exclude the United States Court from exercising jurisdiction.

It is the contention of the Petitioners that the Banking Code, which went into effect six months after he took possession of the bank, has made the Secretary of Banking in possession of the Trust Company a "Receiver" and has subjected him to the jurisdiction of a particular State Court, and, therefore, the United States Court would be interfering with his possession. But the statute merely creates the status of a statutory Receiver and "subjects" him to the jurisdiction of a particular Court, only for the purpose of indicating the State Court, which *shall have jurisdiction over him when it is invoked.* The Opinion of the Circuit Court of Appeals, denying the exclusive possession and control of the Secretary of Banking for the reason that he is a statutory official and not an Equity Receiver quotes with approval from the Opinion of Judge Kirkpatrick, in the case of General Baking Company vs. William D. Gordon, Secretary of Banking, and John J. Sullivan, Deputy:—

> "As to the jurisdictional question raised, I am satisfied that this court has jurisdiction. The Secretary of Banking is an administrative officer. His office exists by statute. He is appointed by the governor and not by the court. He is not an equity receiver, and the mere fact that the statute provides that he shall have the rights, powers and duties of an equity receiver does not make him one, nor does the fact that the Common Pleas Courts of the state are given jurisdiction to make certain orders and decrees relating to the conduct of the liquidation and the rights in the funds does not mean that the fund is in the custody of the court. That depends entirely upon the nature of the office of the liquidating officer and the power from which he derives his authority."

It ill becomes the Petitioners at this time to attempt to set up their "exclusive possession" with the inference of a diligent guardian, who carefully preserving the assets entrusted to him, looks to the ultimate best welfare of his beneficiaries. The bill in the instant case was filed because of the unjustifiable delay and neglect in failing to act in accordance with the clear mandate of the statute under which the Secretary took possession of the Trust Company and because of the general right to have a substituted fiduciary appointed for the Mortgage Pool after the Secretary of Banking has determined to liquidate the Bank. As said in the Opinion in the Circuit Court, by Judge Davis—

> "The Secretary had no right to the custody of these funds when the bill in this case was filed. He determined to liquidate the assets of the Trust Company on April 3, 1933. It was his duty forthwith to give written notice to all parties interested in these funds requiring them within thirty days to apply to the proper court or official for the appointment of a substituted fiduciary to take the place of the Trust Company and if they failed or neglected to make the application within that time, it was his duty to do so. He neither notified the parties in interest nor made the application himself, but did nothing and continued to hold the funds in violation of the statute. If he had performed his duties, as directed by the statute, he would have divested himself of these funds long before the bill was filed."

III.

THE COURT OF COMMON PLEAS DID NOT HAVE EXCLUSIVE JURISDICTION OF THE MORTGAGE TRUST FUND.

A State statute cannot confer exclusive jurisdiction on the Common Pleas Court of Pennsylvania in contraven-

tion of the right of citizens of other states to avail themselves of their remedy in Federal Courts as provided by the Constitution and laws of the United States. The argument of the Petitioners to the effect that exclusive jurisdiction of the Mortgage Trust Fund is vested in the Court of Common Pleas in which the certificate of possession is filed, presents an anomalous situation. If that interpretation be correct, its effect would be to render invalid the statute in question, for this would constitute an abrogation of the right of citizens of other States to avail themselves of the remedy provided in a Federal Court. The opinions of the District Court and Circuit Court of Appeals so ably analyze the fallacy of this stand that it would be merely repetitions to state it here. Nor does Respondents' view that the Federal Court has jurisdiction over these Trust Funds as long as the Court of Common Pleas has not exercised an actual dominion over the same create any confusion. Rather, it constitutes an acceptance of the doctrine which holds that where two courts have concurrent jurisdiction that Court acquires exclusive jurisdiction which first exercises an actual dominion over the res.

O'Neil vs. Welch, 245 Fed. 261 (CCA 3rd Circuit, 1917).

In the two Lower Courts, the issue of concurrent jurisdiction was strenuously argued and in the opinion of Judge Davis, in the Circuit Court of Appeals, he clearly stated the real question as follows:—

> "The real question upon which the determination of this case depends is whether or not the filing of the certified copy of the certificate of possession in the Prothonotary's Office of Chester County conferred jurisdiction on the State Court."

Petitioners have quoted *Port Newark National Bank of*

Newark vs. Waldron 46 Fed. (2nd) 296 (CCA 3rd Circuit 1930) as a parallel case for the proposition that the "dominion" of the Comptroller of the currency was sustained against the claim of a Receiver appointed by the United States Court. It is submitted that this case is not in point and has no application to the instant case. Firstly, because the Court decided (Page 299) that at the time the Bill for the appointment of a Receiver was filed in the United States Court, the Comptroller "had full legal control of, the then future operations of the bank" by virtue of active administrative steps by the Comptroller's Examiner, and secondly because, the Court held, *that the case did not involve a conflict between two Courts of co-ordinate jurisdiction*, but "one between *the judicial and executive arm of the sovereignty*".

It is submitted that the true test is found in the able opinion in the case of *Farmer's Loan and Trust Company vs. Lake Street Elevated Railroad Company, 177 U. S. 51, 20 Sup. Ct. 564, 44 L. ed. 667.*

> "The possession of the res vests the court which has first acquired jurisdiction, with the power to hear and determine all controversies relating thereto, and for the time being disables other courts of co-ordinate jurisdiction from exercising a like power. This rule is essential to the orderly administration of justice, and to prevent unseemly conflicts between courts, whose jurisdiction embraces the same subjects and persons.
>
> Nor is this rule restricted in its application to cases where property has been actually seized under judicial process before a second suit is instituted in another court, but it often applies as well where suits are brought to enforce liens against specific property, to marshall assets, administer trusts or liquidate in-

> solvent estates, and in suits of a similar nature, where in the progress of the litigation, the Court may be compelled to assume the possession and control of the property to be affected. The rule has been declared to be of a special importance in its application to Federal and State Courts . . . ."

The rule as to priority of jurisdiction in cases of this kind was succinctly stated by the late Mr. Chief Justice Taft in the case of *Harkin v. Brundage, 276 U. S. 36, 42, 44, 48 S. Ct. 268, 271, 72 L. Ed. 457*:

> "The principle which should govern in a conflict of jurisdiction like this has been a number of times stated by this court. As between two courts of concurrent and co-ordinate jurisdiction, the court which first obtains jurisdiction and constructive possession of property by filing the bill is entitled to retain it without interference and cannot be deprived of its right to do so, because it may not have obtained prior physical possession by its receiver of the property in dispute."

For some reason, Petitioners have seen fit not to press their argument that the Court of Common Pleas did acquire jurisdiction by filing of this certificate. They ask what more the State Court could do to acquire jurisdiction and whether or not it becomes necessary under the decision of the Circuit Court for the Common Pleas Court to enter a Decree in each matter involved. This evades the issue entirely, for the decisions are manifold which hold that any actual exercise of jurisdiction by a Court having concurrent jurisdiction gives such Court the exclusive right to administer the Fund. Complainants below having selected their forum, it becomes the duty of the District Court to exercise jurisdiction and retain it to the end. Petitioners submit that a State can give its courts jurisdic-

tion in any way it sees fit (Page 25 Petitioners' Brief). This may be true up to that point wherein the rights of a citizen having a concurrent remedy is infringed. *A state cannot take away the plenary power of the Federal courts, given to them by the Constitution and by Congress, by conferring exclusive jurisdiction of such controversy upon its own courts and administrative bodies, by prescribing exclusive methods of commencing or conducting litigation by prohibiting the seizure of the subject matter during its pendency or by any other means.*

Commonwealth of Pennsylvania vs. Williams, supra;

National Surety Company vs. State Bank of Humbolt 120 Fed. 593, 602 (CCA 8th Circuit, 1903);

Morrill et al vs. American Reserve Bond Company, 151 Fed. 305, 313 (CCA 8th Circuit, 1907).

IV.

THE APPOINTMENT OF RECEIVERS DID NOT VIOLATE THE ELEVENTH AMENDMENT.

The cases cited by Petitioners to support their contention that the appointment of Receivers in the District Court was in violation of the eleventh amendment are not applicable to the facts in this case. None of the cited cases deal with actions against State officials, whose powers are administrative in nature as is the Secretary of Banking in the instant case. On the contrary, where the eleventh amendment has been invoked and sustained, the facts of the case clearly indicate an attempt to interfere with the sovereign power of the State by usurping the power of an executive officer of the State, who is acting on behalf of the sovereign itself, or in attempting to acquire a property right to which the sovereign is entitled and should retain.

Where the State itself is actually the party in interest and the effect of Federal Court action would be to interfere with the executive function of the State or to deprive the State of some property interest, then the question of the eleventh amendment might well be invoked. But that is not the situation in the instant case, for *the appointment of Receivers by the United States Court does not affect in any way any property interest whatsoever of the State of Pennsylvania, and surely is not an interference with the exercise of any executive power of the State.* The Brief of the Petitioners clouds the issue by asserting that (Page 27 of Petitioners' Brief) inasmuch as the Commonwealth of Pennsylvania had undertaken to liquidate the affairs of the Trust Company, the United States Court cannot require the Commonwealth to relinquish part of that liquidation at the instance of a private citizen and that "the purpose of the Bills is to take from the State the further management of large funds". It must again be repeated that *the purpose of the Bills, and the appointment of Receivers in no way interferes with the management by the Secretary of Banking of the general assets of the Trust Company, but rather is in compliance with the State statutes* to the extent that it intends to give the beneficiary of the Mortgage Pools a fiduciary who will properly administer these funds under the supervision of the Court. The only departure is in the selection of a forum and that is a Constitutional right which cannot be taken away from the respondents. That the State of Pennsylvania has no property interest in the fund is apparent.

If the contention of the Petitioner were correct, an injunction would not lie against the Secretary as a Receiver of a closed bank for such action would be against the Commonwealth itself. Yet, the Act under which Petitioners claim the right to act as Receivers, the Act of

May 15, 1933, P. L. 565, called the Department of Banking Code, provides in Section 605:—

"Any institution of whose business or property the Secretary has taken possession as Receiver, may at any time within ten days after the Secretary has become Receiver apply to the court for an order, requiring the Secretary to show cause why he should not be enjoined from continuing as Receiver."

The Act of 1933 by Sec. 713-C permits suits against the Secretary of Banking based upon causes of action against the institution which he took over.

"Any action at law or in equity, based upon a cause of action against the institution of which the secretary is receiver, which may be brought against the secretary as receiver, shall be instituted only in the court in which the certificate of possession is filed."

Thus is presented another inconsistency in the Petitioners' Argument. The clear intent of the Legislature was to create an administrative office of the Secretary of Banking, conferring upon him certain statutory powers as a Receiver and simultaneously imposing upon him the ordinary duties and liabilities of a Statutory Receiver; creating an office absolutely independent in its aims, interest and purpose of the Commonwealth itself; an office for the purpose of rendering assistance to depositors of banks and trust companies, and unquestionably not an office exercising sovereign powers or protecting a property interest of the Commonwealth.

In *Allen v. United States 285 Fed. 678*, (CCA 1st Circuit 1923), it was held that the Commissioner of Banking of Massachusetts, who had taken possession of a bank under a State statute was not such an official over whom

the Federal Court would not have jurisdiction in a suit brought against him in an otherwise proper case of a non-resident plaintiff.

In none of the many Receivership cases heretofore argued before this Court, where the State's officer, be he Secretary of Banking, Insurance Commissioner, Labor Commissioner or the like, was the defendant to the action, has the claim of violation of the eleventh amendment been upheld. On the contrary, these officers have been considered as administrative officials; as statutory receivers without the powers or duties of Equity Receivers and not the guardian of a property interest of the State itself or an actor on behalf of the sovereign power. The recent case of *Mitchell vs. Maurer 69 Fed. (2nd) 233 (CCA 9th Circuit) 1934* is typical. The appointment of Federal Receivers of an Insurance Company was affirmed in an attempt by the Insurance Commissioner of California to vacate the same. While the question of the eleventh amendment was not involved in that case, the parties are similar to those in the instant case and apparently it was not seen sound to argue this point. It is submitted that this case is typical of innumerable similar cases heretofore argued before this Court.

In the Lower Courts, the Secretary of Banking relied strongly on the case of *Murray vs. Wilson Distilling Company 213 United States 151; L. ed. 742 (1909)* (Page 29 of Petitioners' Brief). The opinion in that case clearly distinguishes the instant case from those wherein the question of the violation of the eleventh amendment was properly introduced. In that case, the Court held as follows:

> "If we consider as an original question the provisions of the Constitution of South Carolina on the subject, and the terms of the statutes of that State, establishing the dispensary system, we think it is apparent that the purchases which were made by the

State officers or agents, of liquor for consumption in South Carolina were purchases made by the State for its account, and, therefore, that the relationship of debtor and creditor arose from such transactions between the State and the persons who sold the liquor.

We could not, therefore, sustain the exercise of jurisdiction by the Circuit Court, without effect deciding that the State can be compelled by compulsory judicial process to perform a contract obligation. It is certain that, at least, by indirection the Bills of Complaint sought to compel the State to specifically perform alleged contracts with the vendors of liquor by paying for liquor alleged to have been supplied. But it is settled that a Bill in Equity to compel the specific performance of a contract between individuals and a State cannot against the objection of the State be maintained in a court of the United States."

This case distinguishes the instant case from those where the Eleventh Amendment is properly invoked. The Circuit Court of Appeals, after due consideration, deemed this point so inconsequential that it was dismissed in the following words:—

"Appellants allege that this is a suit against the Commonwealth of Pennsylvania and is prohibited by the Eleventh Amendment to the constitution of the United States.

Under the facts in this case, this contention is unsound." (R. 146)

V.

THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION BY APPOINTING RECEIVERS.

At the time of the filing of the Bill for the appointment of Receivers, the complainants were simply exercis-

ing their constitutional rights of selecting the forum made available to citizens of another State than Pennsylvania. It is not here argued by Petitioners that the Federal Court did not have jurisdiction to act, but Petitioners apparently contend that it was an abuse of discretion to have exercised jurisdiction. It is submitted that once the District Court assumed jurisdiction over the subject matter, it became its duty to retain such jurisdiction until the final determination of the action and that under the facts of the case it would have been a violation of such duty not to have appointed the Receivers for the purpose sought.

We shall then restrict our Argument to the final issue as to whether or not the appointment of the Receivers was an abuse of discretion by the District Court. Complainants had requested the appointment of Receivers for a Mortgage Pool which had been in the custody of the Secretary of Banking from February 14, 1933—a period of over six months, during which time the Secretary had unquestionably failed to carry out his duties while in possession of the defunct Trust Company, in neglecting to take the necessary steps provided for divesting himself of the Mortgage Trust Pool. In the meantime, an unsettled real estate market required the most careful and diligent supervision of properties, particularly for the purpose of compelling the payment of interest and taxes, or where interest was in default, the operation of the real estate securing the mortgage, as a mortgagee in possession, entitled under the laws of Pennsylvania to the profits and issues of the mortgaged estate. The Act under which the Secretary of Banking took possession, carries no provision or facility for the State officer's proper management of the Mortgage Pool. The beneficiaries of the Mortgage Pool had no means of ascertaining their equities in the same, for no account had been filed by the Secretary of Banking. In the strained economic pressure prevalent in the land today, it is a little bewildering that Petitioners aver there

was "no necessity" for such appointment. Many beneficiaries of trust funds have discovered too late that conservative or careless operations by Trust Departments have permitted huge arrearages of interest and taxes, so that their interest in trust funds has diminished. Respondents submit that the question presented to the Lower Court was one of real necessity and it would have been a gross violation of duty for the District Court to refuse to act.

Further, Petitioners infer that the Receivers were appointed without the Secretary of Banking having been given an opportunity to answer the Bill. A casual inspection of the record discloses how thin this contention is.

Instead of creating a substantial issue by way of Answer to the Bill, in the initial courts, Petitioners filed various pleadings dilatory in nature and evasive in purpose as Motion to Dismiss (R. 43) and Petition to Vacate (R. 46). Further, at hearing held before Judge Welsh, in the District Court, on September 26, 1933 (R. 64), the Court specifically inquired as to whether or not the Secretary of Banking was going to file an Answer, and received an affirmative reply. But the Secretary of Banking again failed to file an Answer, when so requested. Wherein, then, is the abuse of discretion by the United States Court?

Petitioners complain that notice of the hearing on the motion for the appointment of Receivers was not given the other beneficiaries of the mortgage trust pool. Apart from the fact that the bill was in the ordinary and conventional form for the appointment of Receivers, it was still not incumbent upon the complainants to give such notice. The Banking Act of 1933 does considerably more than define the rights of the Secretary of Banking with respect to these mortgage pools; being chiefly concerned with the beneficiaries, it provides that any participant in the pool may apply for the appointment of a substituted fiduciary either before or after the Secretary of Banking has filed his account. No notice is required. No notice to all could be

given by the Complainants in the Bill, because access to the list of participants was in the hands of the Secretary of Banking. But opportunity was given the Attorney-General to notify other participants (R. 56). This was a class Bill. Moreover, the equities do not demand such procedure—for it may and should be assumed that in the proper exercise of power the Court will regard the welfare of all having common interest with the Complainant. At the arguments below, we contended that the situation is analogous to that presented when a trustee of a fund is deceased and application is made for the appointment of another in his stead. The issues have been needlessly complicated because the Petitioners feel that their high office has been offended. The fund involved is indeed like any other trust fund where the trustee is no longer able to serve, but in addition there is a statutory description of this fund which does not require the notice Petitioners contend should have been given. The complainant's procedure does not violate one iota, the letter or spirit of the statute.

Respondents merely indicate as further substantiation of the Court's action that on the morning of September 4, 1933, after the appointment of the Federal Receivers, the Court at West Chester, Pennsylvania, issued an injunction applied for on Labor Day, a Legal Holiday, restraining the Secretary of Banking and his Deputy Receiver from turning over the assets to the Federal Receivers. This action was instituted to complicate the situation—otherwise it would be absurd. That the United States Court in its sound judgment may have foreseen just such action, and for the purpose of preventing an unseemly race between courts of concurrent jurisdiction, acted promptly, is surely sound policy as well as practical administration.

However, the onus of proving abuse of discretion by the United States Court is on the Petitioners, and it is submitted that they cannot uphold this burden.

In the case of *Kingsport Press, Inc. vs. Brief English Systems, Inc. 54 Fed. (2nd) 497; (CCA, 2nd Circuit) (1931) (Certiorari denied, Owen vs. Kingsport Press 286 U. S. 545, (1932)*, the Court said:—

> "Upon the Bill of Complaint filed in the District Court, showing that the creditors could be paid in full if the business of the defendant was properly managed, it was for that Court to determine as a matter of discretion whether a Receiver ought to be appointed. *We should not interfere with the exercise of that discretion in the absence of proof of abuse*". SAGE vs. MEMPHIS, etc. R. R. COMPANY 125 U. S. 361, 8 S. Ct. 887, 31 L. Ed. 694; FOLK vs. UNITED STATES (CCA) 233 FED. 177; WARD vs. CENTRAL TRUST COMPANY OF ILLINOIS (CCA) 252 FED. 127; CITY BOND AND FINANCE, INC. vs. GRANT (CCA) 30 FED. (2nd) 671."

In the case of *First National Bank of SanFrancisco et al vs. The Detroit Trust Company et al (CCA 9th Circuit) (1918) 248 Fed. 16*, the Court refused to reverse the order, appointing Receivers unless it it appeared that the discretionary power of the Court "has been so improvidently and improperly exercised as to bring this action clearly within the meaning of the term 'abuse of power'". HEINZE vs. BUTTE AND BOSTON CONSOLIDATED MINING COMPANY; 126 FED. 1, 11, 61 (CCA) 63, 73; UNITED STATES SHIPBUILDING COMPANY vs. CONKLIN 126 FED. 132, 60 (CCA) 680; BRIGGS vs. NEAL, 120 FED. 224, 56 (CCA) 572.

The Pennsylvania law in accord: *Franklin National Bank vs. Kennerly Coal & Coke Company; 300 Pa. 479; 150 A. 902 (1930)*.

Petitioners have relied in their Brief, to a considerable extent, upon the case of *Commonwealth vs. Penn General Casualty Company 316 Pa. 1.*

That case has no reference to a situation like the instant case, where participants in a trust fund seek a substituted fiduciary for the Trust Fund after the Trust Company, as Trustee, was taken over by the Secretary of Banking.

This case is so thoroughly analyzed and discounted by Judge Davis in the case of *Commonwealth of Pennsylvania vs. Williams,* supra, that it would constitute surplusage were it repeated here. Judge Davis points out that the State Court neglected the case of *Mitchel vs. Maurer,* supra.

The final recent opinion of Brandeis, J., concerned itself only with the question of diversity of citizenship and the reversal is on that ground alone. The opinion of the Circuit Court of Appeals, however, on the issues similar to the instant case, it is submitted, is sound and in accord with the decisions of the Supreme Court, cited in the brief, on the question of concurrent jurisdiction.

VI.

CONCLUSION.

Your respondents respectfully submit that the Secretary of Banking was only the temporary custodian of the mortgage trust fund at the time of the appointment of Receivers by the District Court. That his only interest in the fund was a bare custody based upon a statutory direction to guard it until another be appointed, in *place of the insolvent Trust Company,* (and not as a substitute for the Secretary of Banking). Since he never obtained exclusive possession of the Mortgage Pool, it follows that, assuming the Secretary of Banking to be the Commonwealth's agent for the purpose of acquiring the Mortgage Pool, that the state secured no greater right than its agent. But even this falls by the wayside, for the Secretary of Banking is merely an administrative officer under the statute creating

his office. The State has no interest in the Pool; nowhere in the Banking Acts can even inferentially, be drawn the conclusion that the State had an interest in the pool. Accordingly, it is submitted that the Eleventh Amendment cannot be invoked.

Nor did the Common Pleas Court of Chester County have exclusive jurisdiction of the Pool by the detail of the Secretary of Banking filing his certificate of possession after he took possession of the Trust Company, without a Court proceeding. This was the essence of Petitioners' arguments below, but here apparently abandoned. Surely, something in actual exercise of dominion over a trust fund must be done by a Court in order to acquire jurisdiction. But the Common Pleas court did nothing, the Secretary of Banking never having invoked the Court of Common Pleas in connection with the Mortgage Pool, nor did any other certificate holder institute any proceeding in the Common Pleas Court in connection with the Pool, *until* after the appointment of Receivers by the United States District Court. Indeed, after the filing of a Certificate of Possession, the Secretary of Banking, if he changed his mind, could have the next day returned the bank to its officers, without any order of any Court, showing conclusively it was not in the control of the Court.

When Complainant filed her bill, the stage was set for a single issue: If the state court had acquired exclusive jurisdiction comity necessitated refusal by the United States Courts to act. While the precise situation has never before arisen in this district, that is, a refusal by the Secretary of Banking to surrender a Trust Fund to its rightful owners through a Federal Receiver, though the principles governing this case are well established, both the District Court and Circuit Court of Appeals, after long consideration wrote careful and sound opinions denying the acquisition of jurisdiction by the State court. Having original albeit concurrent jurisdiction with the

State court, and being the first to exercise an actual dominion over the Mortgage Pool, it became the duty of the Federal Court to proceed as it did.

There is no Federal question presented. Considering the rights of any beneficiary to request the appointment of a substituted fiduciary and the necessity in this case, the exercise of power by the Courts below was proper. True it is, that the beneficiary sought a tribunal not mentioned in the State Act, but it is a presumption that the Legislature had no intention of depriving a citizen of another state of a concurrent remedy in a Federal Court. There can be no presumption that the Legislature intended to abrogate this right, and if such intention existed, it would be of no effect.

Petitioners have contended at great length that the defunct institution being "Quasi-public"—should preclude the Federal Court, on grounds of comity, from exercising jurisdiction. If applicable at all, such argument would be in point only if the general assets of the institution were involved. No interference with such assets is contemplated. On the contrary, the public official authorized to control the general assets, can have no public interest in the mortgage pool.

It is submitted that the issue is simple and that Petitioners in justification of their own neglect have complicated and confused the questions involved. THERE ARE NO QUESTIONS OF INTERFERENCE WITH THE STATE, NOR EVEN WITH A STATE'S OFFICER. Complainants below sought the protection of a Federal Court to preserve her equity in this fund; a protection she felt the Secretary of Banking was not affording her. The lofty sentiments expressed by the Petitioners come too late to conceal the original neglect of duty toward the beneficiaries of the fund.

Finally, if the viewpoint of the Petitioners is sustained, it means that the Federal Court surrenders its

Constitutional and Congressional power for co-ordinate jurisdiction with a State Court in matters affecting the rights of a non-resident of a State where a Banking Commissioner is concerned, and that the statutes of a State are in such matters superior to the Constitution of the United States and the laws of the United States.

Respectfully submitted,

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Counsel for Respondents.

APPENDIX.

RELEVANT PROVISION OF ACT OF 1923, P. L. 809:—

"Section 40. Trust Funds.

(a) Taking Possession by Secretary. Whenever the secretary takes possession of the business and property of a corporation or person in accordance with the provisions of this act, he shall also take possession of all funds, property, and investments held by such corporation or person in any fiduciary capacity, but shall keep the same separate and apart from the assets thereof.

(b) Substituted Fiduciaries.—Upon determining to liquidate the affairs of such corporation or person, the secretary shall forthwith give written notice to all parties interested in any such funds, property, or investments held in a fiduciary capacity, so far as such notice is practicable, requiring them within thirty days to apply to the proper court or official for the appointment of substituted fiduciaries to take the place of such corporation or person. On the failure or neglect of the parties so notified to make such application within the time designated, or in case the parties in interest can not be notified, the secretary shall himself apply for such appointment of substituted fiduciaries.

(c) Settlement Without Accounting.—In any instance where there shall be no dispute as to the amount or identity of such funds, property, or investments, and all parties in interest are sui juris and so

request in writing, the secretary may, without filing of an account, transfer, pay over, and deliver to such substituted fiduciary a receipt and release in full, which shall discharge the secretary and such corporation or person from any further liability in the premises."

PERTINENT PROVISIONS OF THE ACT OF 1933, P. L. 565:—

"Section 604. Certificates of Possession; Filing—A.

The secretary, upon taking possession of the business and property of an institution as receiver, shall forthwith, under the seal of the department, prepare in duplicate a certificate, to be known as the certificate of possession, setting forth that he has become receiver of the institution. It shall state the name of the deputy receiver whom the secretary, pursuant to the provisions of this act, appoints to take charge of the affairs of the institution, and shall set forth the duties which he delegates to such deputy receiver. If the secretary does not appoint a deputy receiver prior to the date of the filing of the certificate of possession, or if he appoints a new deputy receiver or an additional one, or if he adds to the duties of the deputy receiver, he shall prepare, in duplicate, and file a supplement to the certificate of possession."

"Section 605. Injunction to Restrain Secretary. Any institution of whose business or property the secretary has taken possession as receiver, may, at any time within ten days after the secretary has become receiver, apply to the court for an order requiring the secretary to show cause why he should not be enjoined from continuing as receiver. Service may be

made in such action by serving the secretary personally, or by leaving a copy with the deputy in charge of his office in the department, or by serving the deputy receiver appointed by the secretary to manage the affairs of such institution. The court shall, after a hearing upon the merits, either dismiss the application or order the secretary to surrender to the institution possession of its business and property, but no such injunction shall issue where the secretary has been appointed receiver by action of a court of competent jurisdiction, or by action of the institution itself, in accordance with the provisions of this act."

"Section 902. Transfer of Pools and Participations without Filing on Account.—If all the corporations or persons who are the owners of all the undivided interests in any mortgage or securities pool, or in any mortgage, security, or other asset in which the institution shall have created undivided interests, are sui juris, and if they shall agree to the amount asserted by the Secretary to be due him as receiver for services rendered by the institution or by him, and for expenses incurred by either, and if they shall authorize the Secretary to transfer any such mortgage or securities pool, or any such mortgage, security, or other asset to them, or to a substituted fiduciary or to any other corporation or person agreed upon by them, and if they shall execute proper instruments releasing the Secretary and the institution from any further liability to them, the Secretary may transfer to such substituted fiduciary or to such corporation or person, without filing an account, all the mortgages, securities, or other assets comprising such mortgage or securities pool or the mortgage, security, or other asset in which undivided interests have been created. In any case where the institution, as fiduciary of an estate, is the owner on behalf of such estate of any undivided

interests in any such mortgage or securities pool, or in any such mortgage, security, or other asset, and no substituted fiduciary has been appointed for such estate, the Secretary shall not transfer such mortgage or securities pool, or such mortgage, security, or other asset in which undivided interests were created by the institution, unless he shall also be authorized to make such transfer by all corporations or persons having an interest in the estate of which the institution was fiduciary, except that where substituted fiduciaries have not been appointed for unborn beneficiaries of the estate or for other beneficiaries who are not sui juris, the Secretary shall not be required to obtain such authority from anyone in behalf of such unborn beneficiaries or other persons who are not sui juris."

"Section 903. Notice of Filing Account.—A. Upon filing an account as to any mortgages, securities, or other assets comprising any mortgage or securities pool operated by an institution of which he is in possession as receiver, or as to any mortgage, security, or other asset in which the institution shall have created undivided interests, the Secretary shall give notice thereof, in so far as it may be practicable, to all corporations or persons who are the owners of the undivided interests in any such mortgage or securities pool, or in any such mortgage, security, or other asset, and, in any case where the institution as fiduciary of an estate, is the owner on behalf of such estate of any such undivided interest, then to all corporations or persons having an interest in such estate, except that no such notice need be given to anyone on behalf of unborn beneficiaries of such estate or other beneficiaries who are not sui juris, where no substituted fiduciary has been appointed for such beneficiaries. Such notice shall be given to the corporations or persons entitled thereto under this sec-

tion, at their addresses as they appear on the books or other records of the institution, or, if the address of any such corporation or person does not appear thereon, then at the last known address of such corporation or person.

B. Such notice shall state the time and place of the audit of such account, and, except where an application for a substituted fiduciary shall have been made by any other method authorized by this act, it shall also state the intention of the Secretary to apply for a substituted fiduciary for such mortgage or securities pool, or for such mortgage, security, or other asset in which undivided interests were created by the institution, and the time and place of any hearing upon such application which may be fixed by the court."

"Section 904B. The secretary shall transfer to the substituted fiduciary appointed by the court all such mortgages, securities, other assets comprising any such mortgage or securities pool, or any such mortgage, security, or other asset in which undivided interests were created, as are in his possession as receiver, and as to which he shall have filed an account. The substituted fiduciary shall take such mortgages, securities, or other assets without liability for the nature or value of the mortgages, securities, or other assets as investments. Such transfer shall be made in accordance with the order of the court, and in directing such transfer, the court may reserve for future determination any question of surcharge against the institution or the secretary.

The court may, after petition filed pursuant to the provisions of this section, order the Secretary to make such transfer even prior to filing an account, in which case it may also reserve for future determination any question which may arise upon the audit of the account."